PEN v. KAL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[ORIGINATING SUMMONS NO: WA-34-7-06-2021]
4 OCTOBER 2022

Abstract – *(i) In an application to adopt a child, if the child is found to have been born a Muslim, the Adoption Act 1952 does not apply; (ii) Although the welfare of a child is a paramount consideration, consent of the child's mother is the most important factor in an application for adoption. The applicant, in failing to adduce evidence that she had made all efforts to locate the child's mother, was not able to convince the court that it is justified for consent to be dispensed with.*

FAMILY LAW: *Adoption – Application to adopt – Application to adopt illegitimate child of applicant's domestic help – Whether child Muslim – Whether Adoption Act 1952 applied – Whether consent of child's birth mother obtained or dispensed with*

This was an application by the applicant to adopt the first respondent pursuant to the Adoption Act 1952 ('Adoption Act'). The first respondent, who was born in December 2002, was raised by the applicant ever since the first respondent was one-month-old. The applicant claimed that the first respondent was the illegitimate child of her Indonesian domestic help who had gone missing 20 years ago shortly after the first respondent was born and had never been heard of since. The second respondent resisted this application on the basis that the first respondent was a Muslim and as such, the Adoption Act had no application in the present case. Both the applicant and the second respondent adduced copies of the birth certificate of the first respondent, with the applicant's copy indicating that there was no religion whatsoever that was documented for the first respondent, whilst the second respondent's copy indicated that the first respondent was a Muslim. The applicant, in tenaciously disputing the second respondent's copy of the first respondent's birth certificate, contended that the first respondent is and never was a Muslim, as he was raised according to Chinese culture and tradition since birth. The issues that arose were (i) whether the Adoption Act applied; and (ii) whether the consent of the first respondent's mother had been obtained/dispensed with.

Held (dismissing application):

(1) The fact that the applicant had raised the first respondent in the Chinese tradition and culture did not detract from the fact that the first respondent is a Muslim. The second respondent had exhibited a copy of

A the first respondent's birth certificate, which indicated that the first respondent was born and still is a Muslim. The discovery of this birth certificate was through the efforts of the guardian *ad litem* pursuant to her role in accordance with s. 13 of the Adoption Act to establish the identity of the first respondent. There was no reason to dispute the
B veracity of the birth certificate adduced by the guardian *ad litem*. In any event, since it was undisputed that the first respondent's mother is a Muslim, it could not be doubted that the religion of the first respondent should follow suit. On that basis alone, this application was dismissed. (paras 11-16)

C **(2)** Section 12(2) of the Adoption Act requires the first respondent's mother to be named as one of the respondents in this application, unless her consent had been dispensed with pursuant to s. 5 of the Adoption Act. In filing this application, the petitioner had not complied with s. 12 of the Adoption Act as the consent of the first respondent's mother was
D never obtained nor dispensed with by this court. At this juncture, it was important to impress upon parties that adoption is a legal fiction – a legal fiction being a fact, although not true, but is assumed for the advancement of justice, and one which the law will not allow to be rebutted. As such, it was crucial to ensure that all requirements for an
E adoption application are fulfilled. (paras 18-23)

(3) It is trite law that the welfare of the child was of the paramount consideration when addressing the issue of custody, care and control. In cases of adoption, however, although the welfare of the child was one of the factors, it was not the most important consideration for the court.
F Consent, being the most important factor in applications for adoption, is also indicated in s. 6 of the Adoption Act, which lists the factors that this court must be satisfied with, before allowing an application for adoption. (paras 24, 25 & 27)

(4) The burden was upon the applicant to convince this court that it was
G justified for consent to be dispensed with, and in doing so, that she had made all reasonable efforts to locate the first respondent's mother. After all, the first respondent's mother was the domestic help of the applicant. Furthermore, if the first respondent had been abandoned shortly after he was born, which was about 20 years prior to the filing of this
H application, then it begged the question why the applicant had chosen to file this application only now, and then to have conveniently claimed that she was unable to locate the first respondent's mother. No evidence at all was adduced by the applicant to convince this court that she had even made any effort to locate the first respondent's mother, other than
I to merely state that she did not know where the first respondent's mother was. (paras 30 & 31)

Case(s) referred to:
Re Baby M (An Infant) [1994] 1 LNS 195 HC ***(refd)***
Sean O'Casey Patterson v. Chan Hoong Poh & Ors And Another Appeal [2010] 5 CLJ 409 CA ***(refd)***
TPC v. ABU & Anor [1983] 1 LNS 15 HC ***(refd)***

Legislation referred to:
Adoption Act 1952, ss. 5, 6, 12(2), 13, 31
Adoption Rules 1955, r. 7, First Schedule, Form 2

For the applicant & 1st respondent - Weera Premananda & Pook Fong Fee; M/s Ahmad Deniel, Ruben & Co
For the 2nd respondent - Rubini Pubalan, Sharifah Nur Amirah; FCs & Ummi Nurul Farahin Kamaruddin; Guardian Ad Litem - Jabatan Kebajikan Masyarakat Wilayah Persekutuan Kuala Lumpur

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was an application ("this application") by the applicant to adopt the first respondent pursuant to the Adoption Act 1952 ("the Adoption Act").

[2] In the interest of privacy and considering the sensitivity of the issues in these proceedings, the applicant and first respondent have been anonymised in this judgment respectively as PEN and KAL.

The Factual Background

[3] The applicant, a 57-year-old trader, is a widow who has seven children of her own. The first respondent, who was born in December 2002, was raised by the applicant and her late husband, ever since the first respondent was one-month-old.

[4] The applicant claimed that the first respondent was the illegitimate child of her Indonesian domestic help, who had gone missing 20 years ago, shortly after the first respondent was born, and has never been heard of since.

[5] In June 2021, this application was filed, which was dismissed for the following reasons.

Contentions, Evaluation And Findings

Whether The Adoption Act 1952 Applied

[6] The second respondent resisted this application on the basis that the first respondent is a Muslim and as such, the Adoption Act had no application in the present case.

[7] The starting point to this application, therefore, was the issue of whether the Adoption Act even applied to the first respondent, bearing in mind s. 31 of the Adoption Act, which reads:

> Section 31 - Act not to apply to Muslims.
>
> **This Act shall not apply to any person who professes the religion of Islam** either so as to permit the adoption of any child by such a person or so as to permit the adoption by any person of a child who according to the law of the religion of Islam is a Muslim.
>
> (emphasis added)

[8] Both the applicant and second respondent had adduced copies of the birth certificate of the first respondent, with the applicant's copy indicating that there was no religion whatsoever that was documented for the first respondent, whilst the second respondent's copy indicated that the first respondent is a Muslim. The applicant, in tenaciously disputing the second respondent's copy of the first respondent's birth certificate, contended that the first respondent is and never was a Muslim, as he was raised according to Chinese culture and tradition since his birth.

[9] The applicant proceeded to submit that the second respondent had not responded to the affidavits in reply by the applicant and the first respondent, and an additional affidavit by one Mohamad Fazhly bin Johari ("Mohamad Fazhly"), who claimed to be a family friend, and as such, was deemed to have admitted to their contents.

[10] The affidavits of the applicant and Mohamad Fazhly were affirmed on 28 October 2021, whilst the first respondent's affidavit was dated 29 October 2021 ("the three affidavits"). In all three affidavits, it was claimed that the first respondent was abandoned by his mother and that he was raised by the applicant in the Chinese tradition and culture. In the affidavit affirmed by Mohamad Fazhly, he deposed that the first respondent had never observed the Muslim religion.

[11] After perusing the three affidavits, it was my view that the contents of the same were repetitious as the applicant had already deposed these facts in her affidavit in support, affirmed on 31 May 2021. Furthermore, the fact that the applicant had raised the first respondent in the Chinese tradition and culture did not detract from the fact that the first respondent is a Muslim.

[12] As such, the absence of any affidavit in furtherance to the three affidavits had not compromised the second respondent's case as the second respondent, through one Ummi Nurul Farahin binti Kamaruddin, the guardian *ad litem* in the present case, had responded in her affidavit, affirmed on 11 October 2021, where she had denied the averments made in the applicant's affidavit in support, affirmed on 31 May 2021.

[13] In fact, the second respondent had exhibited a copy of the first respondent's birth certificate, which indicated that the first respondent was born and still is a Muslim. The discovery of this birth certificate was through the efforts of the guardian *ad litem* pursuant to her role in accordance with s. 13 of the Adoption Act, to establish the identity of the first respondent. The provision reads:

> Section 13 - Duties of guardian *ad litem*
>
> (1) It shall be the duty of the guardian *ad litem* **to investigate as fully as possible all the circumstances of the child and the applicant, and all other matters relevant to the proposed adoption**, in order to safeguard the interests of the child before the Court, and, in particular, it shall be his duty to include in his investigation the following questions:
>
> (a) whether the statements in the form of application required by subsection 11(1) are true and complete, **particularly as regards the date of birth and the identity of the child** ...
>
> (emphasis added)

[14] There was no reason to dispute the veracity of the birth certificate adduced by the guardian *ad litem*. In any event, since it was undisputed that the first respondent's mother is a Muslim, it could not be doubted that the religion of the first respondent should follow suit.

[15] Besides s. 31 of the Adoption Act as alluded to earlier, reference was made also to the Court of Appeal case of *Sean O'Casey Patterson v. Chan Hoong Poh & Ors And Another Appeal* [2010] 5 CLJ 409; [2010] 3 MLJ 733, where it was stated by Azhar Ma'ah JCA in the following passage:

> ... The reason why Muslims are excluded from the operation of the Adoption Act 1952 (Act 257) is obvious. **The effect of adoption under the Act is repugnant to Islamic law**. I need not elaborate on this.
>
> ...
>
> (emphasis added)

[16] On that basis alone, this application was dismissed. However, in the interest of completeness, I proceeded to address the subsequent issues raised by the applicant.

Whether Consent Of The First Respondent's Mother Had Been Obtained/ Dispensed With

[17] Since this application was with regard to the adoption of the first respondent, the issue at the forefront was whether s. 12 of the Adoption Act had been fulfilled. The provision reads:

> Section 12 - Appointment of guardian *ad litem*: persons to be respondents and service.
>
> (1) Whenever an application for an adoption order is made to the Court, the Court shall appoint a guardian *ad litem* of the child in respect of whom

A the application is made, and upon such appointment the duplicate of the form mentioned in subsection 11(1) shall be delivered to the guardian *ad litem*.

(2) The following persons or bodies shall be made respondents, namely, the child in respect of whom the application is made, the guardian *ad litem* B of the child, **every person who is a parent or guardian of the child or who is liable to contribute to the support of the child**, and, where the applicant has a spouse who is not also an applicant, the spouse of the applicant:

Provided that no person whose consent has been dispensed with in accordance with s. 5 shall be made a respondent. C

(3) As soon as the guardian *ad litem* has been appointed, the Court shall fix a time for the hearing of the application, and shall issue a notice in the prescribed form addressed to the respondents and shall cause such notice to be served on each of them:

D Provided that where the child is in the actual custody of any person, such notice need not be served on the child, but may require such person to produce the child to the Court.

(4) Any notice under this Act shall be served upon any respondent to whom it is addressed either by delivering a copy to him personally, or, with leave of the Court, by sending a copy by registered post to his last E known or usual place of residence, whether such place of residence is in Malaysia or elsewhere.

(emphasis added)

[18] It is clear that s. 12(2) of the Adoption Act requires the first F respondent's mother to be named as one of the respondents in this application, unless her consent had been dispensed with pursuant to s. 5 of the Adoption Act, which reads:

Section 5 – Consents to adoptions

(1) *Save as hereinafter provided in this section, an adoption order shall not be made* G *except with the consent of every person or body of persons who is a parent or guardian of the child in respect of whom the application is made* or who is liable to contribute to the support of the child and an adoption order shall not be made upon the application of one of two spouses without the consent of the other of them:

H *Provided that the Court may dispense with any consent required by this section if satisfied*.

(a) *in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child*;

(b) in the case of a parent or guardian of the child, that he has I abandoned, neglected or persistently ill-treated the child; in the case of a person liable to contribute to the support of the child, that he has persistently neglected or refused so to contribute;

(c) *in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld*; or

(d) in any case, that in accordance with any written law relating to the adoption of children for the time being in force in any country any competent authority has given permission or granted a licence authorising the care and possession of the child to be transferred to the applicant.

(2) The Court may dispense with the consent of the spouse of an applicant for an adoption order if satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving such consent or that the spouses have separated and are living apart and that the separation is likely to be permanent.

(3) The consent of any person to the making of an adoption order in pursuance of an application (not being the consent of the child) may be given (either unconditionally or subject to conditions with respect to the religion in which the child is to be brought up) without knowing the identity of the applicant for the order; and where consent so given by any person is subsequently withdrawn on the ground only that the identity of the applicant is unknown that consent shall be deemed for the purposes of this section to be unnecessarily withheld.

(4) While an application for an adoption is pending in any Court, any parent or guardian of the child who has signified his consent to the making of an adoption order in pursuance of the application shall not except with the leave of the Court remove the child from the care and possession of the applicant; and in considering whether to grant or to refuse such leave the Court shall have regard to the welfare of the child.

(emphasis added)

[19] Reference was also made to r. 7 of the Adoption Rules 1955 ("Adoption Rules") and Form 2 of the First Schedule to the Adoption Rules, both of which read:

Rule 7 - Consents in writing

Every consent required under the Ordinance shall be in accordance with Form No. 2 in the First Schedule hereto and shall be declared and signed in the presence of a Magistrate or a Commissioner for Oaths.

FORM NO. 2

FEDERATION OF MALAYA

STATE/ SETTLEMENT of

In the High Court at ...

Adoption Application No. ... of ...

In the matter of the Adoption Ordinance Act 1952

AND

In the matter of A.B., of ...

..., a child.

CONSENT TO ADOPTION ORDER

I, the undersigned ... of ...

being:

(a) the father of the said child;

(b) **the mother of the said child**;

(c) guardian of the said child;

(d) a person having the actual custody of the said child;

(e) a person liable to contribute to the support of the said child;

(f) the spouse of the applicant;

hereby solemnly and sincerely declare that I understand the nature and effect of the adoption order for which application is made (and that in particular I understand that the effect of the order will be permanently to deprive me of my parental rights). And I hereby consent to the making of an adoption order in favour of the applicant(s).

In witness whereof I have declared and signed this consent on the ... day of ..., at ...

...

Signature.

Declared and signed before me:

Magistrate/ Commissioner for Oaths

(emphasis added)

[20] It appeared, therefore, that in filing this application, the petitioner had not complied with s. 12 of the Adoption Act, as the consent of the first respondent's mother was never obtained nor dispensed with by this court.

[21] It was undisputed that dispensation had not been granted by this court. However, the applicant contended that such dispensation was not a prerequisite to this application, and as such, this court was empowered to dispense with consent during the hearing of this application.

[22] Based on the reading of the relevant provisions, I was unable to agree with the applicant, as she should have obtained dispensation as stipulated by s. 12 of the Adoption Act, prior to the filing of this application.

[23] At this juncture, it was important to impress upon parties that adoption is a legal fiction – a legal fiction being a fact, although not true, but is assumed for the advancement of justice, and one which the law will not allow to be rebutted. As such, it was crucial to ensure that all requirements for an adoption application are fulfilled.

The Most Important Consideration In Applications For Adoption

[24] The applicant further submitted that obtaining consent from the biological parents of the first respondent should not be the priority of this court, as it was the welfare of the child that was the paramount consideration, when dealing with an application for adoption.

[25] I was of the view that this argument was flawed. It is trite law that the welfare of the child was of the paramount consideration when addressing the issue of custody, care and control. In cases of adoption however, although the welfare of the child was one of the factors, it was not the most important consideration for the court.

[26] I found instructive the cases of *TPC v. ABU & Anor* [1983] 1 LNS 15; [1983] 2 MLJ 79 and *Re Baby M (An Infant)* [1994] 1 LNS 195; [1994] 2 MLJ 635, where in both cases, the court had emphasised the significance of obtaining the consent of the biological parents in applications for adoption. In the former case, it was stated by Edgar Joseph Jr J (as he then was) in the following passage:

> Before the Sessions Court, both parties were represented, and based entirely on affidavit evidence, the President approved the application for adoption being guided by the principle that the paramount and overriding consideration was the welfare of the child. With respect, this is not the correct approach. **Welfare is not the paramount and overriding consideration as it is in wardship, guardianship or custody proceedings**: (*re H a Minor* [1982] 3 All ER 84, 92 Paramount consideration in this context means consideration outweighing all others. However, in adoption applications, welfare of the child is certainly the consideration that outweighs any other: (per Lord Simon in *Re D (an Infant) (Parent's Consent* [1977] 1 All ER 145, 150, 160.
>
> (emphasis added)

[27] Consent, being the most important factor in applications for adoption, is also indicated in s. 6 of the Adoption Act, which lists the factors that this court must be satisfied with, before allowing an application for adoption. The provision reads:

> Section 6 - Matters with respect to which Court to be satisfied
>
> The Court before making an adoption order shall be satisfied:
>
> (a) **that every person whose consent is necessary** under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order of which

application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;

(b) that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child;

(c) that neither the applicant nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction; and

(d) that there has been a substantial change in the circumstances, if it appears that the applicant has made a previous application under this Act in respect of the same child.

(emphasis added)

[28] This is fortified by the view expressed by Edgar Joseph Jr J (as he then was) in *TPC v. ABU & Anor*, in the following passage:

> *In section 6 of the Act it is placed second of three matters which the Court has to be satisfied about before making an adoption order. The first being that every person whose consent is necessary and whose consent is not dispensed with has consented* and the third being that neither the applicant nor the parent or guardian has received or any other person made or given or agreed to make or give the applicant any payment or reward in consideration of the adoption.
>
> (emphasis added)

[29] In the present case, the applicant claimed that it was unreasonable to expect her to have obtained the consent of the first respondent's mother since she alleged that it had been 20 years since she had last heard from her.

[30] In my view, the burden was upon the applicant to convince this court that it was justified for consent to be dispensed with, and in doing so, that she had made all reasonable efforts to locate the first respondent's mother. After all, the first respondent's mother was the domestic help of the applicant. Furthermore, if the first respondent had been abandoned shortly after he was born, which was about 20 years prior to the filing of this application, then it begs the question why the applicant had chosen to file this application only now, and then to have conveniently claimed that she was unable to locate the first respondent's mother.

[31] If fact, no evidence at all was adduced by the applicant to convince this court that she had even made any effort to locate the first respondent's mother, other than to merely state that she did not know where the first respondent's mother was.

[32] In the final analysis, I was unconvinced by the applicant's arguments.

Conclusion

[33] In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, both oral and documentary, and submissions of both parties, this application was dismissed for the following reasons:

(i) that the first respondent is a Muslim and as such, the Adoption Act did not apply;

(ii) even if the Adoption Act did apply, the applicant had not complied with the procedure in s. 12 of the Adoption Act;

(iii) that the consent of the first respondent's mother, being the most important factor in an application for adoption, had neither been dispensed with nor obtained.